SUPREME COURT, U. S.

FILED

NO. 73-657

IN THE

Supreme Court of the United States

October Term, 1973

BUDDY LLOYD COX, RONALD B. HEATON, and CHESTER W. PALMER, *Petitioners*

v.

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL 1273, ET AL

OPPOSITION BY RESPONDENT, LOCAL 1273 I.L.A.
To
PETITION FOR A WRIT OF CERTIORARI
To The United States Court of Appeals
For The Fifth Circuit

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OPPOSITION BY RESPONDENT, LOCAL 1273 I.L.A. To PETITION FOR A WRIT OF CERTIORARI To The United States Court of Appeals For The Fifth Circuit

Respondent, Local No. 1273, International Longshoremen's Association, files this, its Opposition to the granting of Writ of Certiorari.

QUEST'ONS PRESENTED

1. Whether the fact finding was correctly made that these Petitioners, as casuals in this hiring hall, did not occupy positions "other than temporary" under the Selective Service Act.

2. Whether the fact finding was correctly made that these Petitioners did not demonstrate the requisite "reasonable certainty" of acquiring seniority status since, before induction, in seeking each day's work they were subject to the daily exercise of managerial discretion by the various foremen in selection or rejection and in view of the limited amount of available work.

3. A third conditional issue arises in this case if the Court sustains Petitioners' position as to both questions, namely: If this Respondent's 1200-hour rule is not compatible with the Act, then among the thousands of casual employees, how and where in the line properly to be drawn for the statutory attachment of re-employment and retroactive seniority rights.

Either one of the two fact findings, if accepted, supports the judgment below.

STATEMENT OF THE FACTS

The District Court, Judge Carl Bue presiding, made extensive fact findings (4a-21a) which, together with Stipulations establish the relevant economic facts.

The available longshoreman's work for Respondent ILA Local 1273 is less than 2 million man hours per year. Under collective bargaining contract, Respondent Union furnishes men as needed to the 30 Respondent stevedore companies.

These employers are competitors of each other. Each employer orders its own gangs to load or unload ships

which it may have under contract. At any given time, a particular stevedore company may, or may not, have a ship under contract for stevedore services.

The bulk of the available man hours of work is performed by about 1,000 regular longshoremen of seniority standing which provides to each of them daily preference for selection to man available jobs through the hiring hall. These regulars are classified in seniority according to the years in which a minimum amount of work was performed, the amount being 1200 hours per year in modern years.

On some days, regular classified longshoremen claim all available jobs. On other days, excess jobs may be available for "casuals."

There is little work for the thousands of casuals. For example, in 1970, 1,686 men worked less than 400 hours each. Another 104 men worked less than 700 hours each. Altogether, these 1800 men averaged about 100 hours each and worked a total of 182,000 hours or about 1/8th of all the available man hours (1.6 million) in 1970.

In the same year, 706 regulars worked over 1200 hours each and totaled 1.2 million hours. This was 3/4ths of the available work in 1970. An additional 157 men logged between 700 and 1200 hours of work. This group performed another 1/8th of the available work.

Similar figures were presented for the year 1969. And, the irregularity of the daily demand for gangs by all stevedores was demonstrated by a tabulation of the first six months' orders in the year 1970.

So there is less than an average of 2000 hours per year of available work for the first claim of the regular

(classified) men. In general, the work which has not been preempted by these regulars has been performed by 1800 men, each of whom worked less than 700 hours each. Indeed, the work available for these men averages about 100 hours per man per year. If all the work left for casuals could be organized and compressed into a few jobs (which is impossible) only about 130 of the 1800 men could get work to the extent of 1200 hours per year (3 days per week).

In order to climb from the mass of casuals to the first step of the seniority ladder, a man must work 1200 hours in a fiscal year ending September 30. The record of the minority who did make it is this:

Year Ending September 30	Number of Men Who Attained Seniority
1964	60
1965	78
1966	120
1967	36
1968	119
1969	34
1970	34
1971	33

In this method of operation which is unique to Houston, Respondent Union maintains an open door policy for the hiring hall. On any day any person may enter for work. There is no application, acceptance, screening, or registration. The casual merely stations himself in an area of the hiring hall designated for unclassified men, and he waits.

Daily, gang foremen pick up their gangs in the order of seniority of the men who come to the hiring hall that day. Every selection of a man for a gang is for one day only. (Incidentally, these gang foremen are rotated among themselves and, so, each foreman does not always pick up a gang each day.)

When a casual is selected by a foreman, he then goes to the ship where he is placed on the single company's payroll for one day only by the timekeeper of the individual stevedore company which ordered the particular gang. The next day, the casual must return to the hiring hall to repeat the procedure of he desires more work. Each day his chance for work depends upon a variety of factors, some of which are: the number of gangs ordered by the various companies, the number of classified men who appear at the hiring hall for work, and, finally, the selection of one particular casual instead of all the others. Casuals have no seniority prefence among themselves.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

1. The inexorable economic fact of this case is this: There is no average steady employment for the casuals even at poverty levels of income. There is no reasonable expectation, and there never has been, that sometime there will be steady work for the large number of men who come to the hiring halls.

As the District Court found, Management and the Government have exerted serious pressure upon the ILA to "de-casualize" the industry. For the sake of efficiency, it is necessary that the work be performed by regular long-

shoremen who report to work consistently and accept the jobs as offered.

Under this pressure, Respondent Union long ago adopted the 1200-hour rule for the regular work force. The purpose and effect of that rule is to force a regular longshoreman to work at least 1200 hours per year upon penalty of forfeiting one year of seniority credit if he does not do so. As the District Court noted, the Department of Labor has formally commended the responsibility accepted by the Union with its 1200-hour rule. At the very least, it must be recognized that legitimate business reason is behind the rule.

Casuals are not wanted by the industry or by the Government. There is no significant work for them. Perhaps the Union should have closed the door of the hiring hall, but in deference to its various legal obligations under both state and federal law, the union has so far adhered to the open-door policy. But whether registration is closed (as in New York State by Government action) or open as in Houston, it is still an economic necessity to absorb into the regular labor force only that number of new men which will match the available work. As in any other industry, there is no alternative to regulating the influx of new men to fit the vacancies which result from death, retirement, etc., or from economic conditions.

2. With these economics before him, the District Court came to two basic factual conclusions. First, a casual does not occupy a job which is "other than temporary" within the meaning of the statute. Second, as a matter of foreseeability or probability, casuals in the Houston hiring hall do not demonstrate a reasonable certainty of attain-

ing the first step of the seniority ladder. The District Court was guided by settled authority in both findings.

The District Court approached the task clearly mindful of the liberal construction which is appropriate to serve the basic policies of the veterans act and also the alertness which a court must employ to avoid every contrivance by contract or otherwise which will remove a large segment of an employer's men from protection of the Act. *Fishgold v. Sullivan Dry Dock & Repair Corp.*, 328 U.S. 275, 285 (1946); *Dame v. C. A. Batson Co.*, 157 F. Supp. 862 (D. Mass. 1957).

3. The Court's analysis of "other than a temporary position" was dictated by clear authority as well as the weighty accumulation of circumstances.

First, the statute requires an "employer" or a "position" with an employer. True, the Union in this case has assumed liability, if any exists. The Union is a proper party defendant. *Fishgold v. Sullivan Dry Dock and Repair Corp.* Since the Union operates the hiring hall, its primary liability is a matter of fairness and the legal basis of its liability would be its agency for the various employers. However, the Union is not an employer itself and does not supply the statutorily necessary "employer" who has in his "employ" a man in a "position . . . other than a temporary position. . . ."

After a man attains the first step of the seniority ladder he has at least some contractual relationship with and some practical access to the work of the several employers on a preferential basis. But while he is still a casual, his connection with an "employer" or a "job" or a "position" is fragile, indeed. The cumulative circumstances are overwhelming:

(1.) The man is a walk-in applicant who is in no sense of the word previously screened or selected.

(2.) The walk-in does not necessarily jibe with an employer's needs or desires. The man's appearance does not fit availability of work.

(3.) There is no type of understanding between employer and employee beyond one day's work. There is no express or implied expectation that tomorrow, or ever again, the employer will have or offer work or that the employee will show up, or that he is invited to show up again. The "contract" is even more tenuous than the usual "at will" employment relationship.

(4.) A casual acquires no seniority preference over anyone, even later arriving casuals, before attainment of the first step of the seniority ladder.

(5.) A casual has no practical or customary preference over anyone, even over later arriving casuals.

(6.) There is no expectation that sufficient work will be available to enable any significant number of casuals to attain D-1 status. To the contrary, it is certain that there will not be that quantity of work available.

(7.) There is lack of nexus between a casual and any particular employer. A man's return to the same employer is uncertain.

The District Court cited and followed *Moe v. Eastern Air Lines, Inc.*, 246 F.2d 215 (C.A. 5, 1957); *United States v. Wimbish*, 154 F.2d 773 (C.A. 4, 1946); and *Brickner v. Johnson Motors*, 425 F.2d 75 (C.A. 7, 1970). These cases stand for the proposition that the controlling

determination is whether, regardless of the contract, there was a reasonable expectation that the employment would be continuous and for an indefinite time. A position is temporary when it has no preferential right to employment and no expectation of more than brief duration.

In accord is *Martin v. Roosevelt Hospital,* 426 F.2d 155 (C.A. 2, 1970), an opinion in which Judge Friendly quoted from an earlier decision by Judge Magruder of the First Circuit:

> "Judge Magruder correctly stated in Trusteed Funds, Inc. v. Dacey, supra, 160 F.2d at 418, 19 LRRM 2469, that 'The important thing is the nature of the position rather than the terms of the contract of employment . . .' He gave as instances of 'temporary' positions 'an extra clerk hired during the holiday rush' and 'a substitute employee hired during the absence of a regular employee on a year's leave,' citing Saltzman v. London Coat of Boston, Inc. Another example of a 'temporary position' would be where a man had been hired to perform a particular task such a a defined piece of research, this has been completed during his military service, and the employer does not regularly employ persons for such tasks. . . ."

In the *Brickner* case, *supra,* the Seventh Circuit following *Moe v. Eastern Air Lines, Inc.,* adopted a two-part test which first examines the the "job" and then, secondly, the employee's relationship to it. It must first be determined whether the position itself is permanent or temporary. Only if the job is permanent do we reach the matter of the employee's status within the position. There is no conflict here with *Brickner.*

After a casual attains D-1 classification, the first step on the seniority ladder, the situation changes. The man has established at least a minimal connection with reasonably steady employment. Although approximately 1000 regulars are ahead of him with first preference for the work, at least he has preference over the 1800 casuals. In that event, each employer, in effect, has made an arrangement with the Union by which all D-1 men and above will have preference for the available work of that employer. This contractual preference, plus the practical fact that the classified men correspond roughly to the manpower requirements to perform the available work of the industry, add up to a "position" which is other than "temporary." Admittedly the connection of the individual to the industry is still a little thin at this level, but the Respondent Union has recognized it as sufficient to justify the recognition of seniority accrual during military service.

But we know of no case which finds the existence of a "position other than temporary" sans contract, sans selection, sans available work, sans expectations, and sans mutual hopes or commitments of any kind. In contrast, in the probationary employee cases, there is available work for almost all probationary employees, so that the employer hires the men and the men accept the work with the mutual hope and expectation that at the other end of the line the employees will fill the employer's need for men to perform regular jobs which both understand will most probably be there for the bulk if not all of the employees. Cf. *Collins v. Weirton Steel Co.*, 398 F.2d 305 (C.A. 4, 1968).

Finally, the Union's open-door policy permits the veteran to return to the hiring hall without haggling over

any question of a statutory right to return as a casual. Thus, we are not concerned here with "reemployment" rights as such. The "other than temporary" determination, however, is a necessary predicate to the award of the retroactive seniority which was claimed in the case after the veterans did attain the first step of the seniority ladder in 1968.

4. Alternatively, the District Court held that retroactive seniority is foreclosed here by the *Tilton-McKinney* "foresight-hindsight" test developed by the Supreme Court in *Tilton v. Missouri Pacific R.R. Co.*, 376 U.S. 169 (1964), and *McKinney v. Missouri-Kansas-Texas R.R. Co.*, 357 U.S. 265 (1958).

The escalator principle comes into play in two situations:

First, after returning to his employer, an employee is promoted to a higher classification. He claims the seniority date in his higher classification should be retroactively adjusted to the date he would have been promoted but for his military service.

Second, a veteran returns to an apprenticeship program which he left to serve his country. Upon his return the veteran completes the apprenticeship program and then claims that his seniority date as a journeyman should be retroactively adjusted to the day he would have become a journeyman but for his military service.

There is little we can add to the District Court's discussion of *Tilton-McKinney* and the escalator principle. In these cases the Supreme Court has carefully defined the reasonable certainty of advancement which must be

discernible as a matter of foresight to justify retroactive seniority. To be sure, the Supreme Court eliminated the ordinary uncertainties of life as obstacles to finding the required reasonable certainty, including economic changes which may make the anticipated work unexpectedly unavailable, but the District Court was quite mindful of this required affirmative approach in the assessment of the probabilities of a veteran's success.

In both *Tilton* and *McKinney* the veterans were permanent employees with fixed seniority rights before induction. The question in each case, as here, was the appropriate seniority date which should be given to the returned veteran in a higher job *after* he attained or was promoted to a higher level. In *Tilton*, retroactive seniority was granted in the higher job while in *McKinney* it was denied. The difference was the existence *vel non* of the required "reasonable certainty" of advancement, taking into account the time of exercise of management discretion and the other surrounding facts. On the subject of management discretion, the court said in *Tilton* that management discretion must be exhausted before induction to satisfy the requisite foreseeable reasonable certainty. We quote from *Tilton:*

> "Properly read, therefore, McKinney holds that where advancement depends on a employer's discretionary choice not exercised prior to entry into service, a returning veteran cannot show within the reasonable certainty required by the Act that he would have enjoyed advancement simply by virtue of continuing employment during the time he was in military service."

Then, in addition to the fact that management discretion was exercised in advance in *Tilton*, the Supreme

Court stressed the following additional factors: The employer railroad suffered from a shortage of journeymen carmen mechanics called "carmen." To relieve the shortage, railroad and union provided for temporary "upgrading" of carmen helpers to do carmen's work. After 1040 hours of work as carmen, carmen helpers would be automatically considered "qualified carmen" and eligible to acquire seniority date as carmen simply by so electing in writing. After selection for "upgrading" a carman helper was entitled to carmen work ahead of other helpers who were selected for upgrading later. This fact did not escape Mr. Justice Goldberg, author of *Tilton,* a labor law specialist. This preferred contractual right to the work, plus the manpower shortage in the carman classification, overcame the theoretical contingency that carman work might not be available or that an upgraded carman helper would not be offered the required 1040 hours of qualifying work.

In making the fact finding that these Petitioners could not show reasonable certainty of attainment of seniority, the District Court was confronted with the stark facts that work is not available for the casuals as a whole, that this fact was well known in advance to all parties, that only 4 percent or less of casuals attain the first step of the seniority ladder, and that managerial discretion exercised through rotating gang foremen on a daily basis was a rigorous weeding-out process that permitted few to make the grade. Compounding the uncertainty of managerial discretion was the irregularity of available work on any given day because of the demonstrated vacillation in orders for gangs. In *Tilton,* management discretion had been exercised before induction by the selection of particular helpers for "upgrading".

In Footnote 5 the District Court made a discriminating comparison between the facts of this case and those in *Montgomery v. Southern Electric Steel Co.*, 410 F.2d 611 (C.A. 5, 1969). In short, the Court appreciated and followed the authorities, gave close attention to the probability inquiry required by escalator principle, and found himself in accord with the defendants on the factual realities of the case.

5. The District Court was not duty bound to disregard the mass of circumstances because the individual veterans maintained a certain clip up to the time of induction. In any case, the Court had evidence before him that in 1969 when 34 casuals made 1200 hours, 63 men failed although they made more than 1100 hours and another 59 men failed although they made over 1000 hours. The same was true of 1970 when 59 men who failed exceeded 1100 hours and an additional 27 exceeded 1000. (Appendix 224; 225-226):

Incidentally, this record also shows that these Petitioners' seemingly promising performance between October 1, 1965 and January, 1966 actually occurred during an 80-day Taft-Hartley injunction, a period of frantic preparations for a nationwide longshoremen's strike which did in fact materialize. During such a preparatory period, there is temporarily available work for casuals which is not available as soon as the emergency passes.

6. But if Repondent Union is mistaken, and if this Court should disagree, then we respectfully request the Court to define the proper line or factor which will better serve the purposes of the Act or to remand the case to the District Court for such determination under the guidance of this Court.

The concern which this Defendant may legitimately express to this Court is that casuals who return to the hiring hall may be awarded retroactive seniority so as to produce more classified men than the available work will support. Certainly, under *Tilton* it is required that the veteran return to complete the required work before advancement or retroactive seniority may be demanded.

The question arises, what requirement should the veteran meet in completing the required work as a basis for demanding retroactivity? Another question is, what amount of work over what period of time must the veteran have performed before induction in order to trigger the right to re-entry into the hiring hall and to achieve possible retroactive seniority?

In this connection, the Court will please be mindful of the difficulties with accepting a straight pro rata performance by the casual as a reliable test. After all, after the first day of work, the casual is far ahead on a pro rata basis of the 1200 hour requirement. Short base periods for calculations can be deceptive.

Another point which should be considered by this Court is the fact that the Respondent Union's open door policy, however odd, is very favorable for veterans. It is common knowledge that must businesses reject applicants with unfavorable draft status, partly to avoid the consequent exposure in cases of drafting. This Court should not unnecessarily push the Union and the stevedore industry to close the doors of the hiring hall. We submit there are more practical policy reasons to deny the claims here than to grant them, even viewing the matter from the side of the veterans.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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